Supreme Court, U.S.
FILED
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No. 01-679

IN THE

Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

When it enacted the Family Educational Rights and Privacy Act ("FERPA"), Congress:

- Sought to implement its objectives by imposing conditions on a school's receipt of federal funds, not by conferring rights on students or parents. 20 U.S.C. §§ 1232g(b)(1), (2).
- Expressed those conditions in terms of a school's "policy or practice," not in terms of any individual disclosure of records. *Id.*
- Specified that the Secretary of Education "shall take appropriate actions to enforce [FERPA] and to deal with violations of [FERPA]," and directed that the Secretary

attempt to achieve voluntary compliance before terminating funding. *Id.* § 1232g(f).

- Specified that the Secretary has responsibility for "investigating, processing, reviewing, and adjudicating violations of [FERPA] and complaints * * * concerning alleged violations of [FERPA]." *Id.* § 1232g(g).

- Directed that the Secretary do so at one centralized location, due to "concern that regionalizing the enforcement of the law may lead to multiple interpretations of it." 120 Cong. Rec. 39,866 (1974); *see* 20 U.S.C. § 1232g(g).

The Department of Education—the agency charged with implementing and enforcing FERPA—has concluded that these features confirm that the statute does not give rise to individual rights enforceable under § 1983. U.S. Br. 16 n.6. *See Wright* v. *City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 427 (1987) (agency opinion on whether statute is enforceable under § 1983 "is entitled to some deference by this Court").

Faced with the foregoing, respondent Doe argues—for the first time—that "quite different" language in subsections (b)(1) and (b)(2) of FERPA shows that Congress intended the latter (but not the former) to confer enforceable rights. Resp. Br. 13. The argument is wrong; (b)(1) and (b)(2) are textually and structurally quite similar, and each conditions funding on a school not having certain policies or practices. Doe's argument that FERPA's remedial scheme does not displace § 1983 fares no better: The argument essentially amounts to a showing that FERPA's remedy is different in important respects from that provided by § 1983, which is *our* point. Congress did not confer rights on students or parents in FERPA, and provided in FERPA the exclusive remedy for any violation of its terms. The contrary decision below should be reversed.

I. RESPONDENT'S NOVEL ARGUMENT REGARDING 20 U.S.C. § 1232g(b)(2)(A) IS NOT PROPERLY BEFORE THE COURT AND IS CONTRARY TO FERPA'S TEXT AND LEGISLATIVE HISTORY.

Respondent Doe now asserts that his § 1983 claim is *not* based on subsection (b)(1) of FERPA, which provides that "[n]o funds shall be made available * * * to any educational agency or institution which has a policy or practice of permitting the release of education records * * * of students without * * * written consent." 20 U.S.C. § 1232g(b)(1). Indeed, he concedes that this provision does not confer individual rights enforceable under § 1983. *See* Resp. Br. 24 (conditions in subsection (b)(1) "all fall short of creating an individualized parental right to prevent release of education record information by withholding consent"). Instead, for the first time, he asserts that the provision on which he premised his § 1983 claim is subsection (b)(2), and makes the novel argument that subsection (b)(2) confers rights because "Congress clearly said something quite different in paragraph (2) than it did in paragraph (1)." Resp. Br. 13. Respondent misconceives the statute.

1. As an initial matter, the Court need not entertain this argument because respondent did not raise it below and the Washington Supreme Court did not pass on it. *See Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996); *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). None of the four briefs Doe submitted to the Washington Supreme Court, nor his brief to the Washington Court of Appeals, made the argument he makes here. *See* Wash. Supreme Ct. Dkt. Nos. 11, 16, 29, 40; Wash. Ct. App. Dkt. No. 46. They did not even *cite* paragraph (2) of section (b), and quoted only paragraph (1). Wash. Ct. App. Dkt. No. 46 at 48. Doe's complaint cited only subsection (b) generally, and tracked the language of (b)(1), not (b)(2). Record 1790-91. *See Blessing* v. *Freestone*, 520 U.S. 329, 342 (1997) (plaintiffs must "identify with particularity the rights they

claim[]" and the "complaint" must permit the court to "ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights"). This Court should not review Doe's new contention based on the language of subsection (b)(2), because the state court was not "apprised of the nature or substance of the federal claim." *Webb* v. *Webb*, 451 U.S. 493, 501 (1981).

2. Doe's argument seems to be that subsection (b)(2) creates individual rights enforceable under § 1983 because, he contends, it authorizes a parent or student to prevent individual instances of disclosure. Even though the provision plainly refers to institutional "policy or practice," Doe argues that the reference to parental consent does not modify the "policy or practice" language but rather is a freestanding right to stop a particular disclosure. Because he concedes that the asserted "right" does not apply against institutions that disclose records other than pursuant to a policy or practice, however, he is forced to frame the individual entitlement awkwardly as a "right to withhold consent and prevent the unauthorized release of personally identifiable information in education records by an educational institution that has a policy or practice of releasing, or providing access to, such information." Resp. Br. 14.

Respondent points to no court, and we are aware of none, that has adopted his new view of FERPA.[1] That is not

[1] With only one exception, none of the federal court of appeals decisions cited by respondent or his amicus analyzed whether FERPA's non-disclosure provision creates rights enforceable under § 1983. *See* Resp. Br. 39; ACLU Br. 16 n.3. Two of the cases did not address the non-disclosure provision at all because they arose under other FERPA provisions, and neither analyzed whether those provisions create enforceable rights. *Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986) (alleged violation of FERPA's *access* provision; not addressing whether FERPA creates enforceable rights and considering only the comprehensive enforcement scheme question); *Tarka* v. *Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990) (alleged violation of *hearing* provision; not analyzing § 1983 question and citing *Fay*). Later cases also did not analyze the § 1983 question, and instead merely relied on the earlier, off-point decisions. *See Brown* v. *City of Oneonta*, 106 F.3d 1125, 1131 (2d Cir. 1997), *cert. denied*, 122 S. Ct. 44 (2001); *Cullens* v. *Bemis*, 1992 WL 337688, at *1, 979 F.2d 850 (6th Cir. 1992) (unpublished disposition).

The *only* federal appellate decision discussing application of this Court's standards to the question presented here incorrectly applied those standards because it believed that "any analytical additions announced in *Suter* are no longer to be followed." *Falvo* v. *Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1211 n.6 (10th Cir. 2000) (quotation omitted), *rev'd on other grounds*, 122 S. Ct. 934 (2002). Thus, *no* federal appellate authority applying this Court's current precedents supports the holding below.

surprising, because respondent's theory does not withstand even cursory reading of the statute. To begin with, subsection (b)(2) is not the only provision of FERPA that refers to parental consent. The first place parental consent is addressed is in subsection (b)(1), which provides that federal funds not be available to an institution that has a "policy or practice of permitting the release of education records * * * without * * * written consent." 20 U.S.C. § 1232g(b)(1). It could not be more clear that this funding condition is aimed at an institutional policy or practice of disclosure without consent, not rights of individual parents to withhold consent. This Doe concedes. Resp. Br. 24.

But the language and structure of (b)(1) and (b)(2) are essentially the same. Subsections (b)(1) and (b)(2) each provide that no funds be made available to a school with a particular policy or practice of disclosing student records. Subsection (b)(1) describes the unlawful policy or practice as disclosure "without the written consent of their parents." Subsection (b)(2) describes it as disclosure "unless * * * there is written consent from the student's parents." In each

case the reference to consent is in the context of a description of the type of policy or practice that triggers the funding prohibition. In each case it is the described policy or practice that violates FERPA, not any particular disclosure. *See* U.S. Br. 5, 15.

This reading does not "erase[ ]" subsection (b)(2) from the statute, as respondent contends. Resp. Br. 22. The description of the unlawful policy or practice appears in both (b)(1) and (b)(2) because the provisions address different questions: (b)(1) addresses to whom records may be disclosed without consent, while (b)(2) addresses how consent is to be obtained and when it may be dispensed with pursuant to a judicial subpoena. In each provision, however, the description of what triggers the funding prohibition is the same: a policy or practice of disclosing student records without proper consent. Such a policy or practice—not any particular disclosure—is what the Act forbids.

Respondent asserts that the other conditions FERPA places on institutions' policies and practices regarding release of education record information—such as providing notice and an opportunity for a hearing to challenge the content of records, 20 U.S.C. § 1232g(b)(1)(B)—are "less individualized" than the consent requirement in (b)(2), Resp. Br. 24, but that is not so. Conditioning federal funding on an institution not having a policy or practice of disclosure without *consent* is no more "individualized" than conditioning federal funding on an institution not having a policy or practice of disclosure without *notice*, or without an opportunity for a *hearing*. FERPA in each case is aimed at the "aggregate," rather than "whether the needs of any particular person have been satisfied." *Blessing*, 520 U.S. at 343.

Respondent's strained effort to divorce FERPA's reference to consent in (b)(2) from the "policy or practice" provision in which it appears—an effort to portray it as an "individual parental consent requirement," Resp. Br. 22—yields arresting

nonsequiturs. For example, he argues: "That the parental consent requirement applies only to an education institution that has a policy or practice of releasing education record information to persons other than those authorized under Section 1232g(b)(1) does not transform the parental consent requirement into a prohibition against a practice or policy, as petitioners contend." Resp. Br. 15. But of course it does.

Congress certainly addressed the privacy interests of students and parents in FERPA. It could have addressed those interests in rights-creating language by providing, for example, that "no student attending a school receiving federal funds shall have their records disclosed without their consent." *Cf.* 120 Cong. Rec. 14,579 (1974) (proposed original subsection (b)(1) of FERPA, which never became law, providing that "*[n]o student shall*, as a part of an applicable program, be required to undergo medical, psychological, or psychiatric examination, testing, or treatment, or immunization * * * or to reveal information about his or her personal or family life without the prior, informed, written consent of the student's parents") (emphasis added). Such phrasing would have focused on the "individual protected" rather than the "person regulated," and accordingly would have presented a stronger case for § 1983 rights. *See Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001). Even under respondent's tortured reading, the language of subsection (b)(2)(A) does not rise to that level.

Nor is FERPA phrased in terms that directly prohibit institutional conduct harmful to students, such as "schools receiving federal funds shall not release any student's records without consent." FERPA is not even phrased in terms that prohibit institutional policies harmful to students, such as "schools receiving federal funds shall not have a policy or practice of releasing any student's records without consent." FERPA instead provides that "[n]o funds shall be made available to" schools with such a policy or practice. As the Solicitor General points out, the Act is phrased not in terms

of the individual protected, or even the person regulated, but instead in terms of the funder—the Department of Education. *See* U.S. Br. 11-12. FERPA accordingly does not confer "an *individual* entitlement" on students enforceable under § 1983. *Bless*[illegible]*g*, 520 U.S. at 343 (emphasis in original).

3. The legislative history confirms that Congress chose to phrase FERPA's nondisclosure condition in terms of institutions rather than individuals. When introduced in the Senate, the bill included consent provisions aimed directly at individual students, using rights-conferring language.[2] These individually-focused provisions were divided from the bill and separately rejected by the Senate, *see* 120 Cong. Rec. 14,605 (1974), and Congress did not use such rights-conferring language in FERPA as enacted.

Respondent places great reliance on isolated remarks of members of Congress during floor debates and even on articles referred to in such remarks, but such materials are

[2] *See* 120 Cong. Rec. 14,579 (1974) (Section 437(b)(1)) ("*No student shall*, as a part of an applicable program, be required to undergo medical, psychological, or psychiatric examination, testing, or treatment, or immunization * * * or to reveal information about his or her personal or family life without the prior, informed, written consent of the student's parents.") (emphasis added); *id.* (Section 437(b)(2)) ("*No student shall*, as a part of any applicable program, be required, without the prior, informed, written consent of the student's parents, to participate in any project [sic] program, or course, the primary purpose or principal effect of which is to affect or alter the personal behavior or personal values of a student, or to explore and develop teaching techniques or courses primarily intended to effect [sic] such behavior and values.") (emphasis added); *id.* (Section 437(b)(3)) ("Parents shall be informed, reasonably in advance and in writing, of the intended participation of their child in any research or experimentation project which is a part of an applicable program. *No child shall* participate in such a project if the parents of such child object to such participation.") (emphasis added).

unreliable guides to congressional intent.[3] *See Garcia* v. *United States*, 469 U.S. 70, 76 n.3 (1984); *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986). To the extent they are accorded any weight at all, the remarks and articles at most suggest that members of Congress thought students and parents would benefit from FERPA, an unsurprising proposition considering that the aim of the law was to regulate disclosure of and access to student records. Those remarks pertaining to disclosure of records at all, rather than other issues such as whether schools should disregard the "values and beliefs of the parents," Resp. Br. 27 (quoting Sen. Buckley at 120 Cong. Rec. 14,581), or parental access to student records, *see id.*, do not indicate an intent to confer individually enforceable rights to withhold consent to particular disclosures of education records. To the contrary, statements of members, including one quoted by respondent, reinforce that Congress was concerned with "*systematic*" violations of student privacy. *Id.* (quoting 120 Cong. Rec. 13,951 (1974) (Sen. Buckley)) (emphasis added). *See* 120 Cong. Rec. 14,581 ("the requirement of parental consent * * * will encourage schools to improve these types of programs and to eliminate the potential for abuses beforehand") (Sen. Buckley). *See also Bauer* v. *Kincaid*, 759 F. Supp. 575, 590 (W.D. Mo. 1991) ("The underlying purpose of FERPA was not to grant individual students a right to privacy or access to educational records, but to stem the growing policy of many institutions to carelessly release educational information."); *accord Smith* v. *Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985),

[3] Respondent gives pride of place to remarks by Representative Kemp, *see* Resp. Br. 27, but they were not even directed at the statutory language at issue. *See* 120 Cong. Rec. 9370 (1974); *id.* at 8505 (amendments introduced by Rep. Kemp). In addition, one of the articles on which respondent heavily relies was not read into the Congressional Record or quoted or discussed in the floor debates. It was merely "mention[ed]" during debate and was in fact not yet even published at that time. *See* Resp. Br. 28, 31 (citing article referred to at 120 Cong. Rec. 14,581).

aff'd without op., 787 F.2d 583 (3d Cir. 1986); *Zaal* v. *Maryland*, 602 A.2d 1247, 1255 (Md. 1992); *Rios* v. *Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977).[4]

II. FERPA'S ADMINISTRATIVE ENFORCEMENT SCHEME IS INCOMPATIBLE WITH § 1983 ACTIONS.

We argued that the comprehensive, centralized administrative enforcement scheme that FERPA provides is incompatible with § 1983 actions and evinces Congress' intent to preclude such actions. Respondent objects that FERPA does not provide for complaints by parents and students, Resp. Br. 35, but he misconstrues the Act. Section 1232g(g) directed the Secretary to "establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of [FERPA] and complaints which may be filed concerning alleged violations of [FERPA]." Respondent misreads this provision when he suggests that it refers to adjudication of complaints filed by the Secretary rather than by parents and students. Parents and students file complaints with FPCO. *See* 34 C.F.R. § 99.63. FPCO reviews them and the school's response; may permit the parties to submit further written or oral arguments; and, following its review and investigation, issues a written notice of its findings and the basis for its findings. *See* 34 C.F.R. §§ 99.64-.66. Parents and students also may participate in hearings on violations of FERPA. *See* 20 U.S.C. § 1234f(b); 34 C.F.R. § 81.7. From these provisions and the broad range of enforcement tools the Act provides to the Secretary, it is apparent that FERPA provides

[4] Respondent argues that a private right of action to enforce FERPA's conditions would enable recovery of damages in situations not actionable under state tort law, such as where information disclosed is "truthful" or "less personal." Resp. Br. 38. But there is no evidence that Congress was concerned with providing a damages remedy in such situations, or any other.

what *Wright*, *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), and *Blessing* did not—a detailed federal administrative procedure for private parties to complain about any alleged violation of the Act, and broad powers enabling the Secretary to correct such violations.

At bottom, Doe's complaint is not that Congress failed to provide a mechanism for resolution of individual parent and student complaints, but that Congress did not provide the full panoply of procedural rights and the damages remedy that a private right of action would afford. *See* Resp. Br. 32. But Congress' decision not to provide those things is precisely why a § 1983 remedy would be incompatible with the remedies Congress *did* expressly provide in FERPA. As respondent acknowledges, "[t]he fact that FERPA's administrative scheme does not afford redress to individual parents is consistent with the statutory scheme." Resp. Br. 34. The enforcement scheme Congress provided is tailored to the goal of institutional compliance precisely because FERPA is concerned with such compliance and does not confer individual rights. Congress wanted to ensure that federal funds not be provided to institutions that have policies and practices addressed by FERPA, but also did not wish to subject the institutions to an overly burdensome and diffuse system of remedial proceedings, appeals, and monetary damages. The fact that Congress provided an avenue for review of grievances under the Act, an avenue that supplies different procedures and remedies than would a right to sue in court, only confirms that inferring such a right would frustrate Congress' intent. As the Court put it in *Smith* v. *Robinson*, 468 U.S. 992, 1011, 1012 (1984), "[a]llowing a plaintiff to circumvent [such] administrative remedies" would "render [them] superfluous." Indeed, Doe never even invoked the administrative remedy provided under FERPA—the § 1983 action he chose instead rendered that remedy "superfluous."[5]

[5] Respondent points to no statement by a member nor any committee or conference report suggesting that Congress believed

There is a vast difference between proscribing certain institutional policies or practices and providing that the Secretary shall "deal with violations," 20 U.S.C. § 1232g(f), on the one hand, and, on the other, conferring individual rights on millions of students from kindergarten to graduate school with the understanding that any state-action violation of those rights would give rise to a federal action for damages plus attorneys' fees. Our legal tradition accords broad scope to school officials in the discharge of their important responsibilities. *See, e.g., Regents of the Univ. of Mich.* v. *Ewing*, 474 U.S. 214, 226 (1985) (noting "a reluctance to trench on the prerogatives of state and local educational institutions"); *Board of Curators of Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, 91 (1978) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.") (quotation omitted). This Court has been guided by such considerations in construing the terms of FERPA itself. *See Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 122 S. Ct. 934, 940 (2002) (rejecting proposed interpretation because "[w]e doubt Congress meant to intervene in this drastic fashion with traditional state functions").

There is no evidence whatever that Congress set itself so resolutely against this tradition when it came to the remedies available under FERPA. The express remedies Congress

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the compensatory remedies available under state law were in any way inadequate. Instead, he relies for this point solely on articles that focus on state administrative practices, not judicial damages remedies. *See* Resp. Br. 31. In any event, to the extent that Congress was aware that private judicial remedies for disclosure of student records predicated on state law already existed, *see id.* at 29-30, it only underscores that Congress saw no need to create additional privately actionable rights in FERPA. *See* 120 Cong. Rec. 39,866 (1974) (Joint Statement) (FERPA's provisions "do not affect whatever rights a student or his parents might have in civil proceedings").

provided demonstrate just the opposite. As the Department of Education and Solicitor General have concluded, FERPA's "enforcement mechanism should be regarded as exclusive." U.S. Br. 27.

III. CONGRESSIONAL INTENT TO CONFER § 1983 RIGHTS IN SPENDING CLAUSE LEGISLATION MUST BE EXPRESSED UNAMBIGUOUSLY.

We explained in our opening brief that this Court's precedents, as well as principles of federalism, separation of powers, and administrative deference, require that when Congress intends to confer § 1983 rights in Spending Clause statutes, it must do so unambiguously. *See* Pet. Br. 12-20. Both Doe and the Solicitor General assert that the "unambiguous" requirement of *Suter* v. *Artist M.*, 503 U.S. 347 (1992), refers only to funding conditions, and not to the remedies available for a breach of such conditions. Resp. Br. 41; U.S. Br. 8. *Suter* plainly provides otherwise: *See* 503 U.S. at 357 ("Did Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act *a right to enforce the requirement* that the State make 'reasonable efforts' to prevent a child from being removed from his home * * *?") (emphasis added); *id.* at 363 ("the 'reasonable efforts' language does not unambiguously confer *an enforceable right* upon the Act's beneficiaries") (emphasis added). This language shows that the "unambiguous" test applies to the conferring of "a right to enforce the requirement," not just to the imposition of the "reasonable efforts" requirement itself on the funding recipient. Accordingly, the courts of appeals have construed *Suter* as "plac[ing] great emphasis on the fact that rights must be 'unambiguously' conferred to be enforceable." *Arkansas Med. Soc'y, Inc.* v. *Reynolds*, 6 F.3d 519, 525 (8th Cir. 1993). *See Stowell* v. *Ives*, 976 F.2d 65, 68 (1st Cir. 1992); *Evergreen Presbyterian Ministries Inc.* v. *Hood*, 235 F.3d 908, 926-927 (5th Cir.

2000); *Doe* v. *Broderick*, 225 F.3d 440, 449 (4th Cir. 2000); *Ellison* v. *Cocke Cty.*, 63 F.3d 467, 472 (6th Cir. 1995).[6]

That is also clear from the fact that *Suter* recognized that the "reasonable efforts" requirement may be enforced by the Secretary. *See* 503 U.S. at 360, 363. That is, the requirement itself *was* unambiguously imposed on the recipient; if the issue had been the ambiguity of the funding condition—as Doe and the Solicitor General contend—not only the individual beneficiaries but also the Secretary would have been unable to enforce it. The Court's discussion of the "unambiguous" requirement plainly goes to the availability of an individual action remedy under § 1983. *See also Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (scope of remedy under Title IX dependent upon fact that statute is Spending Clause legislation in nature of contract).[7]

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[6] The Solicitor General vastly overreads 42 U.S.C. §§ 1320a-2, 1320a-10. *See* U.S. Br. 6, 9, 23. Those provisions simply addressed one part of the *Suter* opinion, which construed a statutory requirement that a state plan contain certain elements as at most giving rise to an enforceable right that the plan do so, rather than that the State comply with those elements. Sections 1320a-2 and 1320a-10 do not specify that any such element is enforceable under § 1983, and by their terms apply only to the Social Security Act. Nor do they address the requirement announced in *Pennhurst State School and Hospital* v. *Halderman*, 457 U.S. 1 (1981), and applied in *Suter*, that when Congress imposes § 1983 liability pursuant to the Spending Clause it do so unambiguously. The suggestion that these discrete provisions have anything broader to say about § 1983 jurisprudence is fanciful. *See Harris* v. *James*, 127 F.3d 993, 1002-03 (11th Cir. 1997) ("Section 1320a-2 does not purport to reject any and all grounds relied upon in *Suter*; it purports only to overrule certain grounds—*i.e.*, that a provision is unenforceable simply because of its inclusion in a section requiring a state plan or specifying the contents of such a plan.").

[7] The *only* authority cited by either Doe or the Solicitor General to the contrary is a footnote from *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983). Resp. Br. 41; U.S. Br. 8. That case concerned not § 1983 but the quite distinct question of the ability of the Secretary to pursue restitution to recover misspent federal funds. It is one thing to say that a funding recipient is reasonably on notice that it must repay misspent funds; quite another to say that such a recipient is similarly on notice that it is liable to third parties in § 1983 private damages actions.

The development of this Court's approach to determining whether Spending Clause statutes confer rights enforceable under § 1983 did not end with *Wilder*. *Suter* made clear that the test articulated in *Wilder* is applied to determining whether Congress "unambiguously confer[red] upon the * * * beneficiaries of the Act a right to enforce the requirement" at issue, 503 U.S. at 357, and *Blessing* confirmed that what must be "unambiguously confer[red]" was "an *individual* entitlement." 520 U.S. at 343 (emphasis in original). Under respondent's view, satisfying the *Wilder* test would require little more than meeting the standards a plaintiff must meet to establish Constitutional and prudential standing—*i.e.*, that he is within the "zone of interests" the statute was enacted to protect (that "the provision in question benefit the plaintiff"), and that the disclosure injured him in a distinct, judicially redressable manner (that the interest claimed to be injured is "not so 'vague and amorphous' that its enforcement would strain judicial competence"). *Cf., e.g., Federal Elec. Comm'n* v. *Akins*, 524 U.S. 11, 20, 24 (1998). *Suter* and *Blessing*, however, make clear that this is not all that is required to show that a plaintiff has a right enforceable under § 1983.

Those cases confirm that, at the end of the day, the "inquiry focuses on congressional intent," *Blessing*, 520 U.S. at 341, requiring "pains to analyze the statutory provisions in detail, in light of the entire legislative enactment." *Suter*, 503 U.S. at 357. Here as elsewhere "the judicial task is to interpret the statute Congress has passed." *Sandoval*, 532 U.S. at 286. *See id.* at 288 ("We therefore begin (and find we can end) our search for Congress's intent with the text and structure of

[the statute]."). Doing so, and applying the normal tools of statutory construction, reveals that Congress did not intend in FERPA to confer rights enforceable by § 1983.

IV. THE CONGRESS THAT ENACTED § 1983 DID NOT REGARD THIRD-PARTY BENEFICIARIES OF GRANT CONDITIONS AS ENJOYING ENFORCEABLE "RIGHTS".

We explained in our opening brief that the Congress that enacted § 1983 would not have understood conditions in Spending Clause legislation to confer enforceable "rights," because such legislation is in the nature of a contract and, when § 1983 was enacted, third-party beneficiaries typically enjoyed no rights under a contract. *See* Pet. Br. 39-42. Respondent Doe and the Solicitor General first object to treating Spending Clause enactments differently from other legislation in determining available remedies, Resp. Br. 47; U.S. Br. 18, but this Court has already held that the "contractual nature" of such laws "has implications for our construction of the scope of available remedies." *Gebser*, 524 U.S. at 287. The Solicitor General's next objection is that Spending Clause legislation does not result in "an ordinary contract," U.S. Br. 18, but we never suggested that it does—simply that the contractual nature of such enactments has consequences for how they should be construed. This Court has said as much on numerous occasions. *See, e.g.*, *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Gebser*, 524 U.S. at 286; *Franklin* v. *Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 74 (1992); *Bennett* v. *New Jersey*, 470 U.S. 632, 638 (1985); *Pennhurst*, 451 U.S. at 17.

The Solicitor General also contends that third-party beneficiaries generally *were* able to sue under a contract when § 1983 was enacted. U.S. Br. 20. But not even the principal authority on which the Solicitor General relies supports that view of nineteenth century contract law. *See id.* (citing Peter Karsten, *The "Discovery" of Law by English and American Jurists of the Seventeenth, Eighteenth, and Nineteenth*

Centuries: Third-Party Beneficiaries as a Test Case, 9 Law & Hist. Rev. 327, 340-353 (1991)).

Indeed, according to that source, after 1820, American courts began to follow the English trend towards applying strict standards of privity and consideration, and "thereupon denied the third-party beneficiary the right to sue on the contract." *Id.* at 340.[8] *See also* 4 Arthur L. Corbin, *Corbin on Contracts* § 782 at 80-81 (1963) ("Many early cases, both English and American, expressly stated the rule that one for whose benefit a contract is made can enforce it[,] * * * *[but] there was a tendency away from it in the middle of the last century*") (emphasis added). Not surprisingly, then, treatises published contemporaneously with the enactment of § 1983 noted that, as a general rule, "no stranger to the consideration can take advantage of a contract, though made for his benefit." 1 William W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874). *See* Pet. Br. 40 n.12 (citing authorities); *see also* William W. Story, *A Treatise on the Law of Contracts Not Under Seal* 83 (1st ed. 1844) ("As between the plaintiff and the defendant, there must be a privity of contract, and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him * * * the action is not maintainable"). Although some authorities suggested the contrary, *see* U.S. Br. 21, and there certainly were exceptions to the general rule,[9] this Court

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[8] The Solicitor General's contention that American courts began enforcing stricter privity requirements *after* § 1983 was enacted is thus off by some 60 years. *See* U.S. Br. 22.

[9] This Court's decision in *Hendrick* v. *Lindsay*, 93 U.S. 143 (1876), involved one such exception. *See* U.S. Br. 21 (citing case). There, the plaintiff had executed a bond in reliance on a promise by the defendant to another that if the latter secured a bond to delay execution of a judgment the defendant would guarantee the issuer against loss. Thus, the plaintiff whose right to sue was upheld by the Court in that case had essentially performed services amounting to consideration. 93 U.S. at 146-148.

itself stated unanimously in 1878 that "[n]o doubt the *general rule* is that * * * privity must exist." *National Bank* v. *Grand Lodge*, 98 U.S. 123, 124 (1878) (emphasis added). *See id.* at 124-125 (again referring to "the *general rule* that privity of contract is required") (emphasis added).

That is all the proposition we assert requires. Our point, after all, is not that there were *no* circumstances under which third-party beneficiaries could sue, only that this was the general rule and—as such—that it is pertinent in assessing Congress' understanding of the scope of § 1983. *See, e.g.*, *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967) (adopting good faith and probable cause immunity under § 1983 for police officers acting under a statute later found unconstitutional, although existence of common law immunity in such a case "is not entirely free from doubt").

In any event, the Solicitor General is uncomfortable enough with the force of the contract law analogy to suggest that trust law provides a more appropriate model for Spending Clause legislation. In the Solicitor General's view, a recipient of federal funding "serve[s] as a trustee for the persons Congress intended its grants to benefit," and it was understood when § 1983 was enacted that a beneficiary may sue a trustee for violating the terms of the trust. U.S. Br. 19-20.

That, of course, is not how this Court has tended to view Spending Clause legislation, repeatedly invoking the contract law analogy instead. *See supra* at 16 (citing cases). The Solicitor General, however, asserts that the trust analogy "in fact was relied on in federal grant cases contemporaneous with the enactment of Section 1983." U.S. Br. 19. Each of the cases cited by the Solicitor General involved land grants from the federal government to States for the building of railroads. And what the Solicitor General neglects to explain is that the law was clear in those cases that third-party

beneficiaries of the conditions accompanying such grants had no right to enforce those conditions.

The only Supreme Court case the Solicitor General cites as an example of the "appropriate analogy," *Tucker* v. *Ferguson*, 89 U.S. (22 Wall.) 527 (1874), *see* U.S. Br. 19, explained that in the case of a default with respect to any of the conditions accompanying the federal grant, "it would be for the United States, by office found, or other proper proceeding, to assert their [*i.e.*, the United States'] rights. But they do not complain, *and the complainants cannot do it vicariously for them*." *Id.* at 571 (emphasis added). The Court cited for this proposition *Baker* v. *Gee*, 68 U.S. (1 Wall.) 333 (1863), a case in which a railroad company sought to enforce the condition in a federal land grant that the property be used only for a railroad, against Missouri's asserted power to modify that condition. As this Court held, "If this was a contest between the United States and the State of Missouri, the question of power would be a proper subject for examination. But the United States are not complaining, *and no other party has a right to complain*." *Id.* at 337 (emphasis added).[10]

In short, the "appropriate analogy" the Solicitor General would draw confirms that—at the time § 1983 was enacted—third parties could not enforce the terms of a federal grant. This should come as no surprise; it is simply a specific application of the "general rule" that third-party beneficiaries had no rights under a contract. *National Bank*, 98 U.S. at 124. The Congress that enacted § 1983 would therefore not

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[10] *See also Western R.R. Co. of Minn.* v. *DeGraf*, 6 N.W. 341, 343 (Minn. 1880) ("No one but the United States can complain that the conditions subsequent annexed to the grant of the state have not been complied with, or have been violated.") (citing *Baker* v. *Gee*). The cases the Solicitor General cites for the proposition that beneficiaries had the right to sue a trustee had nothing to do with federal grant conditions. *See* U.S. Br. 20.

have thought that such third parties had "rights" enforceable under that statute.

CONCLUSION

For the foregoing reasons, and those in petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

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